

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

RONALD M. AYERS, §
Plaintiff, §
v. § CASE NO. SA-10-CA-612
§
JAMES D. DANNEBAUM, et al., §
Defendants. §

DEFENDANTS' MOTION FOR PARTIAL RECONSIDERATION

TO THE HONORABLE HARRY LEE HUDSPETH:

Defendants James D. Dannenbaum, Paul L. Foster, and Printice L. Gary, in their official capacities as members of The Board of Regents of the University of Texas System (“Regents”), move for partial reconsideration of the Court’s October 1, 2012 *Order Regarding Motion for Summary Judgment* (Doc. No. 84). The Regents respectfully request that the Court also dismiss the Family and Medical Leave Act (“FMLA”) claim, because that claim was addressed in a footnote in the *Motion for Summary Judgment*. (*See* Doc. No. 71, at n.2).

A. The Fifth Circuit Has Held That Raising a Summary Judgment Argument in a Footnote Is Sufficient to Dismiss a Claim on That Basis.

In *United States v. Houston Pipeline*, the Fifth Circuit noted that pursuant to FED. R. CIV. PRO. 56, district courts may grant summary judgment based on considering the “whole record, and not just the portion highlighted by the motion itself.” 37 F.3d 224, 227 (5th Cir. 1994) (internal quotation and citation omitted). The Fifth Circuit then noted in *Turco v. Hoechst Celanese Corp.* that raising a summary judgment argument in a footnote was sufficient to dismiss a claim on that basis. 101 F.3d 1090, 1093 (1996). The *Turco* court wrote that while the argument “was raised in a footnote, it clearly places [plaintiff] on notice that the issue of his

qualification was part of the summary judgment submitted by the defendant.” *Id.*

Here, the Regents had argued at length that there was no evidence the stated reasons for Plaintiff’s terminations were false. *See Doc. No. 71*, at 6-7. Plaintiff had clear notice of this basic factual argument—which as the Court noted, has been undisputed. In their Footnote 2, the Regents also argued the FMLA claim should be dismissed based on the same factual argument:

To the extent Plaintiff still maintains a claim under the Family Medical Leave Act, it fails for the same reasons: there is no evidence the Regents stated reasons are false, much less evidence that retaliation was the real reason.

Id. at 6, n.2.

The Regents had thus asked the Court to dismiss the FMLA claim based on the same factual argument made regarding the Section 1983 claim. Accordingly, the Court may dismiss the FMLA claim based on the Regents’ already-filed summary judgment motion. *Turco*, 101 F.3d at 1093.

B. The Equities Favor Resolving This Entire Case on Summary Judgment, Rather Than Holding an Unnecessary Trial Where the Dispositive Facts Are Undisputed.

The Regents addressed the FMLA claim in a footnote because there was uncertainty among the parties as to whether it remained a viable claim. Plaintiff’s counsel had represented to defense counsel that he *did not* believe the FMLA claim remained in the lawsuit. In an abundance of caution, the Regents in their summary judgment motion still briefly addressed the FMLA claim in a footnote, based on Fifth Circuit guidance noted above.

In any event, because the undisputed facts regarding Plaintiff’s termination dispose of any FMLA claim, there is no genuine issue of fact for trial on the FMLA claim. *See Order*, at 6-7; FED. R. CIV. P. 56. To conserve judicial resources and avoid needless legal expense incurred by an unnecessary October 22, 2012 trial, the Regents respectfully request reconsideration regarding dismissing the remaining FMLA claim, and entering judgment in favor of the Regents.

DATE: October 2, 2012

Respectfully submitted,

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/s/ Drew L. Harris

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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF CONFERENCE

I hereby certify that on October 2, 2012, defense counsel conferred with opposing counsel Mr. Glenn Levy by phone, and he indicated that he was opposed to the motion.

/s/ Drew L. Harris
DREW L. HARRIS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was sent via Electronic Filing Notification System on this the 2nd day of October, 2012, to:

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/s/ Drew L. Harris
DREW L. HARRIS